IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

INDEX

SUBJECT INDEX

Page

CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

In this Reply Brief petitioner will briefly comment upon some of the more important aspects in which the Government's Brief fails to meet the basic points urged in petitioner's opening Brief.

I.

The Government's Brief Does Not Detract From Petitioner's Argument That His Arrest Was Unlawful Because Federal Officers Entered His Apartment to Execute the Arrest by Opening a Closed but Unlocked Door Without First Announcing Their Authority and Purpose and Being Refused Admittance.

The thrust of the Government's argument is that the announcement requirement of 18 U.S.C. § 3109 applies only if federal officers seeking access to a private dwelling for the purpose of executing an arrest or conducting a search resort to "a violent forcing of locked doors." (R. Br. 11.)[1] This argument is based upon a narrow interpretation of the statute, and leads to a result which is wholly inconsistent both with the objectives served by the announcement requirement and with the weight of authority.

A. The Constitutional Underpinnings and Objectives of the Announcement Requirement Demand a Rejection of the Government's Position.

The Government's argument is based principally upon a mechanical and detached application of the general rule of statutory construction that words used by Congress should be given their "literal meaning" and should be "taken in their ordinary sense and according to the common understanding." (R. Br. 10.) In view of the fact that the announcement requirement of Section 3109 applies when the police "break open" the door or window of a house, the

[1] Throughout this Reply Brief, the Government's Brief will be designated "R. Br.", and petitioner's opening Brief will be designated "P. Br.".

Government then concludes that the requirement attaches only if the police make a *forcible* entry, since—so the argument goes—the ordinary and generally accepted definition of the words "break open" connotes the use of force.

Respondent's approach to the question of statutory construction involved in this case is overly simplified and ignores the overriding principle of statutory construction that the Court must "look to . . . [the statute's] objective and policy", and must seek a construction that does not produce incongruous results. *United States* v. *Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); see *United States* v. *Shirey*, 359 U.S. 255, 260-61 (1959). Judged by this standard, the weaknesses of the Government's argument are readily apparent.

Respondent concedes—as it must—that "a police officer's method of entry into a private residence, to arrest or to search, presents an issue of constitutional dimension". (R. Br. 18.) In view of that fact, this Court has recognized that the announcement requirement of Section 3109 "should not be given grudging application." *Miller* v. *United States*, 357 U.S. 301, 313 (1958). Yet, despite its concession and this Court's admonition, the Government urges a hypertechnical interpretation of the statute which would lead to absurdly incongruous results and would frustrate the objectives of the statute.

For example, if the "violent forcing of locked doors" were a prerequisite to the application of the announcement requirement—as the Government contends—the police would not be compelled to state their authority and purpose if they gained access to a private dwelling by peace-

fully unscrewing the hinges of a door or by using a high-powered magnet to shift a door bolt into an unlocked position, but the requirement presumably would apply if they entered by lightly pushing a partially opened door which was secured by a rusted and dilapidated chain hanging by a thread. Surely, Congress could not have intended that the constitutionally inspired protection from unannounced police intrusions into the sanctity of a person's house embodied in Section 3109 should depend upon artificial distinctions such as these. Indeed, in admitting that an unannounced entry gained "by opening a locked door with a passkey obtained without the owner's consent . . . presents a more difficult problem . . . and could be held to be a 'breaking' " (R. Br. 11), the Government acknowledges the difficulties inherent in attempting to apply its artificial and technical construction.

The complete bankruptcy of the Government's position is revealed by its attempt to reconcile the objectives of the announcement requirement contained in Section 3109 with its theory that the requirement obtains only when the police forcibly enter a private dwelling. Thus, with respect to the statutory objective of preserving the homeowner's constitutionally protected right to privacy, the Government suggests that, by failing to lock his door, the occupant of a home has forfeited his right "to require persons who have reason to be on his premises to state their business before crossing his threshold". (R. Br. 20.) Apparently, the Government would therefore equate the Fourth Amendment rights of a homeowner who has failed to lock his door with those of a shopkeeper whose premises are open to the public. Surely, as was indicated in petitioner's opening Brief (P. Br. 25-26, 34-37), any such notion of forfeiture is incon-

sistent with this Court's recognition that "a man's house is his castle", *Miller* v. *United States*, 357 U.S. 301, 307 (1958), and that "at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there to be free from unreasonable governmental intrusion". *Silverman* v. *United States*, 365 U.S. 505, 511 (1961).

Nor does respondent offer a satisfactory explanation for the distinction between locked and unlocked doors in terms of the statutory objective of minimizing the violence which frequently accompanies unannounced intrusions into private dwellings. The Government's only response is the *ipse dixit* that "the absence of any force or violence in effectuating the entry greatly detracts from this danger." (R. Br. 22.) This assertion is supported neither by authority nor by logic. As Mr. Justice Jackson recognized in *McDonald* v. *United States*, 335 U.S. 451, 460-61 (1948) (concurring opinion), any uninvited and unannounced entry into a private dwelling is fraught with danger both to the occupant of the house and to the police. A plainclothes policeman who stealthily enters through the unlocked door of an apartment is just as likely to be mistaken for a burglar and to elicit a violent response as is the officer who shatters a locked door or utilizes a passkey.

The fact of the matter is that respondent would denigrate completely the importance of the objectives which underlie the announcement requirement, as is indicated by its statement that the only advantage of the requirement is to afford "an opportunity to be summoned to the door to be presented with a request which he [the occupant] has no right to refuse". (R. Br. 20-21.) This over-simplified characterization of the requirement ignores the fundamental sig-

nificance of the summons to the door and the announcement of the officer's authority and purpose. As indicated in petitioner's opening Brief (P. Br. 24-28), the announcement pays due regard to the occupant's Constitutional right of privacy; it comports with the presumption of innocence which every citizen enjoys; and it reduces the risk of violence attendant upon an unannounced entry into a private dwelling.

B. Neither the Common Law Nor the Weight of Modern Judicial Precedents Is Contrary to Petitioner's Position.

The Government argues that its interpretation of the words "break open" in Section 3109 finds support in the common law, and it relies principally upon a dictum in *Semayne's Case,* 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1603), to support the argument.[2] However, the fact is, as conceded by the Government (R. Br. 13), that no English case appears to have dealt specifically with the question whether

[2] In *Semayne's Case,* the court was addressing itself only to the questions of when a breaking by a sheriff is permissible, and whether an announcement must be made prior to such a breaking. At different points in the opinion, the court utilized seemingly inconsistent language with respect to the use of force as a prerequisite to the announcement requirement. For example, in expressing concern for the convenience of the dweller of the house, 77 Eng. Rep. at 195-96, the court's comments clearly implied that the sheriff must announce his authority and purpose regardless of whether the door was locked or unlocked. Thus, it indicated that a breaking sufficient to invoke the announcement requirement occurred "if the doors be not open," *id.* at 195, or if the owner has simply "shut the door of his own house." *Id.* at 199. On the other hand, there is language in the opinion which—as the Government suggests (R. Br. 12)—implies that a breaking requires the use of force. *Id.* at 196. Little weight should be placed on the court's apparently conflicting language, particularly since the issue involved in this case was neither before that court nor a matter to which it specifically directed its attention.

an officer may lawfully make an unannounced entry through a closed but unlocked door.

To the extent that the common law is relevant, it lends credence to petitioner's position because it clearly and unambiguously recognized the inviolability of a person's dwelling and established a broad prohibition against unwarranted intrusions into the home. (See P. Br. 19.) Thus, even though the English judges recognized that circumstances might warrant the sheriff's breaking into a private dwelling to make an arrest, they were careful to place limitations upon the sheriff's authority—the principal one being the announcement requirement which is embodied in Section 3109. See *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 195-96 (1603). Surely, judges who placed so high a premium upon the sanctity of the home would not have applied the announcement requirement in the niggardly fashion urged by the Government.

Indeed, it is precisely because the announcement requirement was designed as a safeguard for individual liberty that it should be given the broadest possible application. For this reason, it is entirely appropriate that the state courts and commentators have drawn upon the broad definition of "breaking" in the law of burglary to determine what constitutes a breaking by a police officer. (See authorities cited in P. Br. 21-24.)[3] Their approach is con-

[3] Respondent seeks to distinguish these cases on the ground that they involved the entry of a policeman to execute civil process, and not to make an arrest. In petitioner's view, this distinction is irrelevant. The overriding consideration with respect to both the burglar and the police officer—which the Government ignores—is that society's high regard for the sanctity of the home furnishes the common ingredient for establishing a broad definition of what constitutes a "breaking." In the case of the burglar, such a definition protects the citizen from any felonious attempt to enter his house. In the case of the police officer, a broad definition protects the

NCR

MICROCARD EDITIONS, INC.
PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

CARD 4

sistent with this Court's ruling that, when the rights of an occupant of a home are involved, the term "breaking" should be interpreted as encompassing the mere opening of an unlocked means of entry. *Chapman* v. *United States*, 365 U.S. 610, 616 (1961).

In petitioner's view, the rights and safety of the homeowner, and the security of an arresting officer can be fully protected only if this Court concludes that "'the word 'break,' as used in 18 U.S.C. § 3109, means 'enter without permission','" and that the word is not limited merely to an entry which results "in a breaking of parts of the house." *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960).

C. The Officers' Failure to Announce Their Authority and Purpose Before Entering Petitioner's Apartment Was Not Justified by Any "Exigent Circumstances".

Respondent urges that, if the announcement requirement of Section 3109 does apply to entry through a closed but unlocked door, "the circumstances of the present case justified an entry without announcement." (R. Br. 22.)[4]

---

citizen from the fright and violence which may result from an unannounced police intrusion into his home. In both cases, the broad definition serves to safeguard the citizen's right to remain secure in his home.

[4] The Government also suggests that the state of the Record concerning the agents' entry into petitioner's apartment is incomplete, and that it is possible that the officers actually did satisfy the announcement requirement. (R. Br. 8-9.) Although the agents were not specifically asked whether they announced their authority and purpose before entering, the following, detailed description by the agent in charge of what transpired at the time of entry leaves little room for the Government's supposition:

> "I knocked on the door, waited a few seconds, and no answer came from within, so I opened the unlocked door and came into the apartment." (R. 21.)

This Court has indicated that it is an open question whether federal officers may excuse their failure to comply with the announcement requirement of Section 3109 because of the existence of so-called "exigent circumstances." *Miller* v. *United States*, 357 U.S. 301, 309 (1958). See also *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963). Assuming *arguendo* that the announcement requirement of Section 3109 may be excused under appropriate circumstances, the fundamental objectives served by that mandate necessitate that the scope of the exception be carefully limited. See *Miller* v. *United States*, 357 U.S. 301, 313 (1958); *Ker* v. *California*, 374 U.S. 23, 47 (1963) (dissenting opinion).

As indicated in petitioner's opening Brief (P. Br. 20), the facts of this case do not fall within any of the categories of "exigent circumstances" which the majority and dissenting opinions in *Ker* recognized as appropriate bases for excusing failure to comply with the requirement when it is applied as a Constitutional mandate in state prosecutions.

The Government speculates that the officers' conduct in this case was justified by their fear that "announcement might have increased the danger to Jones and could have also put the officers themselves in peril." (R. Br. 25.) However, there is not one shred of evidence in the Record to support this conjecture. Having failed to conduct any independent investigation, the agents had no reason to suspect that petitioner was armed, or that on the basis of prior behavior he might attempt to resist arrest. Nor did the officers hear anything over the electronic transmitter attached to Jones, or through the door, which could have conceivably justified any fear on their part that Jones was

in imminent peril. Indeed, contrary to the Government's assertion that the transmitter was "intended to be a life-line to Jones" (R. Br. 24), a fair reading of the Record suggests that the principal purpose of that device was to obtain a "recording" of any incriminating statements which petitioner might make (R. 26). It was only after the agents were frustrated in that objective that they "decided it was time to go into the apartment." (R. 21, 26.)

While it is true that the officers were not specifically asked to explain their failure to make the required announcement, there was substantial testimony concerning the circumstances and events which led to their breaking into petitioner's apartment. (R. 20-21, 25-26, 45-46.) If, in fact, an apprehension over Jones' safety was a motivating consideration, it is reasonable to assume that the officers would have mentioned that in the course of their detailed description of the circumstances surrounding their entry into the apartment. The Record is barren of any such testimony.

The fact is that the agents had virtually complete control of the situation. They chose the timing, the manner and place of petitioner's arrest, and it was they who sent Jones into petitioner's apartment. Having created the circumstances under which petitioner was arrested, the officers should not be permitted to rely upon those circumstances to excuse their failure to comply with the announcement requirement of Section 3109—particularly in the absence of any specific evidence indicating that Jones was in peril. Any other conclusion might facilitate—or even encourage—police practices in conflict with the objectives of the statutory requirement of announcement.

II.

The Government's Brief Fails to Rebut Petitioner's Contention That His Arrest Was Unlawful Because of the Officers' Failure to Obtain a Warrant of Any Kind Under Circumstances Which Required Them to Do So.

In response to petitioner's argument that his arrest was unlawful because it was executed without a warrant, at night, in his home, after an unannounced, unconsented to entry by the police, the Government offers two arguments. First, it asserts that the warrantless arrest was authorized by 26 U.S.C. § 7607.[5] Second, it contends that at the time the officers obtained adequate evidence to establish clearly that probable cause existed, "it was . . . not practicable to seek a warrant or to delay petitioner's arrest." (R. Br. 27.) Neither of these arguments is persuasive.

Although 26 U.S.C. § 7607 does authorize narcotics agents to "make arrests without warrant" upon probable cause, the principal purpose of the statute was to confer upon narcotics agents the same general arresting authority which other federal law enforcement officers possess. See

---

[5] That statute provides, in pertinent part, as follows:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 *(1)*, of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401*(1)*), may—
>
> • • •
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Miller v. *United States*, 357 U.S. 301, 305 (1958); Hearings Before the Subcommittee on Narcotics of the House Ways and Means Committee, 89th Cong., 2d Sess., 7, 8 (1956); compare 18 U.S.C. § 3052. It is clear that the authority of narcotics agents to execute warrantless arrests is governed by the same Fourth Amendment criteria that apply to other federal police officers. *Wong Sun* v. *United States*, 371 U.S. 471, 478, n. 6 (1963); *United States* v. *Smith*, 308 F.2d 657, 661 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963).

Accordingly, the mere fact that Congress has given narcotics agents general authorization to make arrests without warrant is not dispositive of the question whether, under the circumstances of this case, petitioner's arrest was lawful. As noted in petitioner's opening Brief (P. Br. 33-34), this Court has already acknowledged that "the forceful nighttime entry into a dwelling to arrest a person reasonably believed within upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought" raises a "grave constitutional question." *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958). That question is not resolved by a facile reference to the general provisions of Section 7607. Nor is it resolved by the invocation of authorities (R. Br. 26) which involved factual situations substantially different from the circumstances surrounding petitioner's arrest.

In addition, it simply begs the question to assert, as the Government does, that it was impractical for the officers to have sought a warrant after Jones had entered petitioner's apartment.* This claim overlooks the signifi-

* The Government contends that the officers clearly had probable cause only at that time, when, by means of the transmitter carried

cant fact that the officers were in complete control of the timing and place of the arrest, and that they had failed to engage in any substantial independent investigation which would have supported an application for a warrant prior to their arrival at petitioner's apartment. It also ignores the numerous alternatives available to the police which would have been more consistent with the warrant procedure. (See P. Br. 37-38.)

In short, by ignoring these salient facts and by relying upon the so-called—and self-imposed—impracticality of obtaining a warrant, the Government urges a result which would emasculate the warrant procedure. In view of the fundamental importance of that procedure (see P. Br. 34-44), the officers' conduct under the circumstances of this case should not be condoned by the Court.

---

by Jones, they heard "petitioner ask Jones whether he had his package." (R. Br. 27.) This assertion distorts the Record. The testimony of the officer in charge of the arrest establishes that the police were unable to determine whether Jones or petitioner had mentioned the word "package," or to ascertain what petitioner's comments during that portion of the conversation were. He testified as follows:

> "Well, I, I heard a part of a conversation; something about—package. I heard the word 'package' mentioned, and I heard a reply.
>
> "This, this is about all I could gather from that; but I definitely heard the word 'package' *from one voice*, and the other voice replied something, but the music again was fairly loud and I could not exactly make it out." (R. 21) (Emphasis supplied.)

Conclusion

For reasons stated in petitioner's opening Brief and in this Reply Brief, the judgment of the Court of Appeals should be reversed, and petitioner's conviction should be set aside.

Respectfully submitted,

MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

April 1968

OPINION

SUPREME COURT OF THE UNITED STATES

No. 898.—October Term, 1967.

Johnny Sabbath, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 3, 1968.]

Mr. Justice Marshall delivered the opinion of the Court.

The issue in this case is whether petitioner's arrest was invalid because federal officers opened the closed but unlocked door of petitioner's apartment and entered in order to arrest him without first announcing their identity and purpose. We hold that the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search incident thereto should not have been admitted at petitioner's trial.

On February 19, 1966, one William Jones was detained at the border between California and Mexico by United States customs agents, who found in his possession an ounce of cocaine. After some questioning, Jones told the agents that he had been given the narcotics in Tijuana, Mexico, by a person named "Johnny," whom he had accompanied there from Los Angeles. He said he was to transport the narcotics to "Johnny" in the latter city.

Also found in Jones' possession was a card on which was written the name "Johnny" and a Los Angeles telephone number. On the following day at about 3 p. m., Jones made a call to the telephone number listed on the card; a customs agent dialed the number, and with Jones' permission, listened to the ensuing conversation. A male voice answered the call, and Jones addressed the man as "Johnny." Jones said he was in San Diego, and still had

"his thing." The man asked Jones if he had "any trouble getting through the line." Jones replied that he had not. Jones inquired whether "Johnny" planned to remain at home, and upon receiving an affirmative answer, indicated that he was on his way to Los Angeles, and would go to the man's apartment.

At about 7:30 that evening, the customs agents went with Jones to an apartment building in Los Angeles. The agents returned to Jones the cocaine they had seized from him, and placed a small broadcasting device on him. The agents waited outside the building, listening on a receiving apparatus. Jones knocked on the apartment door; a woman answered. Jones asked if "Johnny" was in, and was told to wait a minute. Steps were heard and then a man asked Jones something about "getting through the line." Because of noise from a phonograph in the apartment, reception from the broadcasting device on Jones' person was poor, but agents did hear the word "package."

The customs agents waited outside for five to 10 minutes, and then proceeded to the apartment door. One knocked, waited a few seconds, and, receiving no response, opened the unlocked door, and entered the apartment with his gun drawn. Other agents followed, at least one of whom also had his gun drawn. They saw petitioner sitting on a couch, in the process of withdrawing his hand from under the adjacent cushion. After placing petitioner under arrest, an agent found the package of cocaine under the cushion, and subsequently other items (*e. g.*, small pieces of tin foil) were found in the apartment; officers testified at trial they were adapted to packaging narcotics.

Petitioner and Jones were indicted for knowingly importing the cocaine into this country and concealing it, in violation of 21 U. S. C. §§ 173 and 174. Petitioner was tried alone. The narcotics seized at petitioner's

apartment was admitted into evidence, over objection. On appeal, following the conviction, the Court of Appeals for the Ninth Circuit ruled that the officers, in effecting entry to petitioner's apartment by opening the closed but unlocked door, did not "break open" the door within the meaning of 18 U. S. C. § 3109 and therefore were not required by that statute to make a prior announcement of "authority and purpose." 380 F. 2d 108. We granted certiorari, 389 U. S. 1003 (1967), to consider the somewhat uncomplicated but nonetheless significant issue of whether the agent's entry was consonant with federal law.[1] We hold that it was not, and therefore reverse.

The statute here involved, 18 U. S. C. § 3109,[2] deals with the entry of federal officers into a dwelling in terms only in regard to the execution of a search warrant. This Court has held, however, that the validity of such an entry of a federal officer to effect an arrest without a warrant "must be tested by criteria identical to those embodied in" that statute. *Miller* v. *United States*, 357

---

[1] The Government contends in this Court that petitioner did not adequately raise at trial the issue of the agents' manner of entry, and therefore that it did not have sufficient opportunity to indicate the full circumstances surrounding the entry and petitioner's arrest. However, petitioner's trial counsel, in the course of objecting, clearly stated there were no facts "sufficient to justify this officer's breaking into" the apartment, and his objection was truncated by a ruling of the trial judge. In any event, the Government met the issue on the merits in the Court of Appeals, and apparently did not there contend the record was inadequate for its resolution; and the Court of Appeals decided the issue on the merits. In these circumstances, we are justified in likewise doing so.

[2] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

U. S. 301, 306 (1958); *Wong Sun* v. *United States*, 371 U. S. 471, 482–484 (1963).[3] We therefore agree with the parties and with the court below that we must look to § 3109 as controlling.

In *Miller* v. *United States*, *supra*, the common law background to § 3109 was extensively examined.[4] The Court there concluded, *id.*, at 303:

> "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in § 3109 the reverence of the law for the individual's right of privacy in his house."

It was also noted, *id.*, at 313, n. 12, that another facet of the rule of announcement was, generally, to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there. See also *McDonald* v. *United States*, 335 U. S. 451, 460–461 (concurring opinion).

Considering the purposes of § 3109, it would indeed be a "grudging application" to hold, as the Government urges, that the use of "force" is an indispensable element of the statute. To be sure, the statute uses the phrase "break open" and that connotes some use of force. But linguistic analysis seldom is adequate when a statute is designed to incorporate fundamental values and the ongoing development of the common law.[5] Thus, the

---

[3] See also, *e. g.*, *Ng Pui Yu* v. *United States*, 352 F. 2d 626, 631 (C. A. 9th Cir. 1965); *Gatlin* v. *United States*, 117 U. S. App. D. C. 123, 130, 326 F. 2d 666, 673 (C. A. D. C. Cir. 1963); *United States* v. *Cruz*, 265 F. Supp. 15, 21 (W. D. Tex. 1967).

[4] See also *Ker* v. *California*, 374 U. S. 23, 47–59 (1963) (opinion of BRENNAN, J.).

[5] While distinctions are obvious, a useful analogy is nonetheless afforded by the common and case law development of the law of

California Supreme Court has recently interpreted the common-law rule of announcement codified in a state statute identical in relevant terms to § 3109 to apply to an entry by police through a closed but unlocked door. *People* v. *Rosales*, 68 Cal. 2d —, 437 P. 2d 489 (1968). And it has been held that § 3109 applies to entries effected by the use of a passkey,[6] which require no more force than does the turning of a doorknob. An unannounced intrusion into a dwelling—what § 3109 basically proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or, as here, open a closed but unlocked door.[7] The protection afforded by, and the values inherent in, § 3109

---

burglary: a forcible entry has generally been eliminated as an element of that crime under statutes using the word "break," or similar such words. See R. Perkins, Criminal Law 149–150 (1957); J. Michael & H. Wechsler, Criminal Law and Its Administration 367–382 (1940); Note, A Rationale of the Law of Burglary, 51 Col. L. Rev. 1009, 1012–1015 (1951). Commentators on the law of arrest have viewed the development of that body of law as similar. See H. Voorhees, Law of Arrest §§ 159, 172–173 (1904); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 806 (1924):

"What constitutes 'breaking' seems to be the same as in burglary: lifting a latch, turning a doorknob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door . . . is a breaking . . . ." (Footnotes omitted.)

See generally Blakey, The Rule of Announcement and Unlawful Entry, 112 U. Pa. L. Rev. 499 (1964).

[6] See, *e. g.*, *Munoz* v. *United States*, 325 F. 2d 23, 26 (C. A. 9th Cir. 1963); *United States* v. *Sims*, 231 F. Supp. 251, 254; cf. *People* v. *Stephens*, 249 Cal. App. 2d 113, 57 Cal. Rptr. 66 (1967). See also *Ker* v. *California*, 374 U. S., at 38.

[7] We do not deal here with an entries obtained by ruse, which have been viewed as involving no "breaking." See, *e. g.*, *Smith* v. *United States*, 357 F. 2d 486, 488 n. 1 (C. A. 5th Cir. 1966); *Leahy* v. *United States*, 272 F. 2d 487, 489 (C. A. 9th Cir. 1960). See also Wilgus, n. 5, *supra*, at 806.

must be "governed by something more than the fortuitous circumstance of an unlocked door." *Keiningham* v. *United States*, 109 U. S. App. D. C. 272, 276, 287 F. 2d 126, 130 (1960).

The Government seeks to invoke an exception to the rule of announcement, contending that the agents' lack of compliance with the statute is excused because an announcement might have endangered the informant Jones or the officers themselves. See, *e. g.*, *Gilbert* v. *United States*, 366 F. 2d 923, 931 (C. A. 9th Cir. 1966), cert. denied, 388 U. S. 922 (1967); cf. *Ker* v. *California*, 374 U. S. 23, 39–40 (1963) (opinion of Clark, J.); *id.*, at 47 (opinion of BRENNAN, J.). However, whether or not "exigent circumstances," *Miller* v. *United States*, *supra*, at 309, would excuse compliance with § 3109, this record does not reveal any substantial basis for excusing the failure of the agents here to announce their authority and purpose. The agents had no basis for assuming petitioner was armed or might resist arrest, or that Jones was in any danger. Nor, as to the former, did the agents make any independent investigation of petitioner prior to setting the stage for his arrest with the narcotics in his possession.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK dissents.

---

[8] Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker* v. *California*, *supra*, at 47 (opinion of BRENNAN, J.), and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification. See generally Blakey, n. 5, *supra*.